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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JEROME G. BEERY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

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35pp

Questions Presented

1) Whether the petitioner's constitutional rights as protected by the immunity provisions of 11 U.S.C 25(a)(10)(1976) were violated.

2) Whether direct reference by a witness before the grand jury to bankruptcy testimony given by the petitioner in proceedings before the bankruptcy court requires dismissal of the indictment.

3) Whether it is proper to continue the appeal process in the criminal case when the question of the voluntary nature of the original proceeding in bankruptcy is still pending before the lower courts.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming a judgment entered on August 16, 1983 by the United States District Court for the District of Kansas.

CITATIONS TO OPINIONS BELOW

The order of the District Court dated August 16, 1983 is printed in the appendix.

The initial judgment of the District Court dated May 7, 1979 is printed in the appendix.

The Court of Appeals decision of January 9, 1985 is printed in the appendix.

The Court of Appeals denied a petition for rehearing. That denial is printed in the appendix.

JURISDICTION

The opinion of the United States Court of Appeals was entered on January 9, 1985. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

STATEMENT OF THE CASE

Petitioner originally filed a voluntary bankruptcy petition on January 16, 1976, seeking judicial relief under Chapter XI of the Bankruptcy Act[1]. Beery was adjudged a bankrupt on April 15, 1976 at which time Dan E. Turner was named trustee.

In September 1978, Beery was indicted by a grand jury with three counts of concealing assets and one count of witholding a document from the receiver/trustee. He was also charged with perjury before the grand jury. Beery was tried and convicted

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1 Since the proceeding were initiated on January 16, 1976, all of the proceedings fall under the pre-1978 Bankruptcy Act.

on the concealment and witholding charges and acquitted of perjury.[2] Beery appealed his convictions. In that appeal, United States v. Beery, 678 F.2d 856 (10th Cir. 1982), the court ruled that there was sufficient evidence in the record to support the defendant's convictions, however, the court vacated the convictions and remanded the case to the district court with instructions to make further findings concerning Beery's allegation that the immunity granted to him by 11 U.S.C. 25(a)(10) had been violated by use before the grand jury of testimony that he was compelled to give in a bankruptcy proceeding. Specifically, the district court was instructed that it should first give Beery an opportunity to show that he had been required to submit to an examination covered by 11 U.S.C. 25(a)(10) and relating to matters in the federal prosecution.

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2 The original judgment of the District Court states that the conviction on all four counts was for concealing assets. The Appeals Court instructed the District Court to correct that judgment but that correction was not made.

The district court was then instructed that upon such a showing the burden should shift to the government to prove that the evidence introduced at the grand jury proceedings and at the trial had independent sources and had not been derived from defendant's immunized bankruptcy testimony. The court was further instructed that if it found some of the government's testimony to have been improperly derived from the defendant's immunized testimony, it was to dismiss the indictment, unless it found beyond a reasonable doubt that the error had been harmless.

On June 14, 1983, the district court held an evidentiary hearing. Evidence was submitted at the hearing by both the defendant and the government. Based on the evidence introduced at this hearing, the court concluded that the government did not directly or indirectly use the defendant's testimony as a lead to the evidence that was subsequently used at the grand jury

and at the trial. The court, therefore, reinstated the defendant's conviction. The appeals court affirmed the district court's decision.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has rendered a decision which is in conflict with the decision of another federal court of appeals; has decided a federal question in a way which is in conflict with applicable decisions of the Supreme Court; and because the lower court's failure to require the government to prove all of its evidence had been derived from legitimate, independent sources has deprived the petitioner of his immunity rights under the Fifth Amendment.

1. PETITIONER'S CONSTITUTIONAL RIGHTS AS PROTECTED BY THE IMMUNITY PROVISIONS OF 11 U.S.C 25(a)(10)(1976) WERE VIOLATED.

The government conceded that Beery was required to submit to examination on matters involved in the criminal prosecution. (district court order, August 16, 1983, page 3). Thus, the heavy burden of proving

that all of the evidence presented to the grand jury and to the jury had been derived from legitimate independent sources fell upon the government. This burden was indeed a heavy one. This was recognized by the court of appeals. Quoting from that decision

> "The trustee, Dan Turner, was a witness at the grand jury proceeding and at trial. He had attended bankruptcy hearings and knew of Beery's testimony at them. Testimony by the trustee at the grand jury proceeding was presented through questioning by the prosecuting attorney."
>
> U.S.A v. Beery

The immunized testimony occurred in 1976 and 1977. The grand jury proceeding was in 1978. Thus Turner had access to that immunized testimony well before he testified at the grand jury proceeding and subsequently at the criminal trial. Neither Mr. Turner nor the prosecutor can therefore qualify as legitimate independent sources.

In Nemes the court explained:

> The inference that the prosecutor's lack of access to compelled testimony assures the existence of independent sources cannot be relied upon to afford the witness the full protection the Constitution guarantees. The prosecutor may have never seen the witness's testimony and may believe in good faith that no one associated with the federal prosecution has seen it, but

such a disclaimer does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators. Only by affirmatively proving that his evidence comes from sources independent of the immunized testimony can the prosecutor assure that the witness is in the same position he would have enjoyed had his self-incrimination privilege been displaced by use immunity.

Therefore the disclaimers by the prosecutor, Mr. Piper, the FBI agent, and by Mr. Turner, cannot be relied upon. It should be noted that Mr. Piper and Mr. Turner, although they initially made such disclaimers in the court hearing of June 14, 1983, subsequently withdrew those disclaimers under cross-examination.

Another damaging piece of evidence was the FBI report introduced at the June 14, 1983 hearing. (Exhibit A) The only FBI witness called at that hearing was Mr. Piper who first stated that there was absolutely no information in the entire FBI filed which was obtained from Mr. Beery at a bankruptcy hearing. (page 8, line 14) Contrast that with page 2 of Exhibit A where an interview was being conducted by a special agent of the FBI.

Exhibit A clearly shows that the FBI made extensive efforts to interview individuals who had access to Beery's immunized testimony, including Mr. Turner. Note that many of the names in the FBI report are blanked out according to FBI policy. This makes the task of proving legitimate independent sources impossible.

On page 2 of Exhibit A Turner advised the FBI special agent that:

> " . . . the bankruptcy action was assigned to Judge ROBERT B MORTON, Wichita, Kansas, who declared BEERY to be bankrupt on April 15, 1976 after BEERY appeared in person but persisted in his refusal to verify any schedule of assets and liabilities or to disclose in writing the details of his business affairs"

Note that this is almost the identical testimony Turner gave before the grand jury.

On page 14 of Exhibit A Turner stated:

". . . that there is an indication of possible concealment of assets on the part of BEERY."

Since the prosecutor had access to the FBI report and to Mr. Turner the ruling of the district court that the government had

proved that all of its evidence presented to the grand jury and to the jury was derived from independent sources is in conflict with Kastigar, Nemes, Seiffert, and the Fifth Amendment.

Further there are 53 pages in Exhibit A which contain numerous interviews. Most names have been blocked out, some pages have been deleted, and no names of FBI agents are included. The government conceded that it had access to Exhibit A.(Tr. of June 14, 1983 hearing, page 64, line 10) Mr. Piper testified that there were three or four or five agents who had conducted interviews at various times. (Tr. p13, 112) The government called none of these other agents nor made any attempt to show that they had access to compelled testimony or interviewed individuals who had access to such compelled testimony.

The criminal trial took about eight days with numerous government exhibits and witnesses. Those witnesses called by

the government at the trial were:

Philip Castillo
B.Frank Cross
Billy J. Deane
Adele Konkel
John Glenn McKenzie
Helmut Mlakar
Gary K. Morley
Rick Edward Swartz
Dan Turner
Patricia Wise
Thomas Z. Barrett
James Robert Groff
Lloyd G. Lunsway
Brenda M. Manske
Margie Redmond
Dick Roseborough
Larry Von Feldt
John Vorse

With the exception of Dan Turner, the government called none of the above witnesses for the June 14, 1983 hearing which took less than two hours. Therefore the government made no attempt to show that the testimony of the witnesses was derived from independent sources. In addition, the government introduced 69 exhibits at the trial but made no attempt at the June 14, 1983 hearing to show that these exhibits had been derived from independent sources. It should be evident that the government

failed to meet the burden of showing legitimate independent sources. I suggest that the district court and the court of appeals has overlooked that failure.

CONCLUSION

The petitioner's constitutional rights as protected by the immunity provisions the the Fifth Amendment and 11 USC 25(a)(10) were violated.

WITNESS' DIRECT REFERENCES TO PETITIONER'S BANKRUPTCY TESTIMONY REQUIRES DISMISSAL OF INDICTMENT.

This question is straightforward and involves the testimony of the trustee, Dan Turner, before the grand jury. The immunity granted by 11 U.S.C 25(a)(10) provides in the pertinent part:

"The bankrupt shall . . . at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his

estate or the granting of his discharge; but no testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge . . . (Emphasis added).

The court of appeals ruled in its opinion of January 9, 1985 that:

"we are convinced that the district court's finding that the government's case was not tainted as a result of any illegal use of the defendant's bankruptcy testimony is supported by the evidence."

The appeals court had examined the same evidence in its ruling of May 14, 1982 and came to a different conclusion. The court refers to three instances of Turner's testimony before the grand jury as follows:

". . . When the arrangement prepared by Beery was presented to the Court . . . he was supposed to provide the Court with an itemized list of all his debts and his assets and he refused. His attorney prepared it and he refused to sign that document and verify that this was a complete list of all his assets and liabilities . ." (Grand Jury Transcript pages 7-8)

The second instance where Mr. Turner referred to Beery's bankruptcy testimony was

the following interchange between the prosecutor and Mr. Turner:(Tr. p 9)

Q When you serve in each position (as receiver or trustee), you take the assets--they must be turned over?

A The bankrupt must be candid with you and turn over all his assets.

Q In this case was Mr. Beery candid with you?

A No, he never has been, never.

The third instance of Turner referring directly to bankruptcy testimony of Beery occurred when Turner was asked to explain what he knew about some of the money Beery had allegedly concealed. Turner responded (Tr. p 12.)

"We don't know what became of that money, whether he gambled it away, whether he took it or what, but that money has been lost or we have no idea what he did with it. I know we have questioned him on several occasions about it. His first response was, "You show me what I've did with it or where we took it and then I'll tell you if you're right," and then after we traced it and we showed him that he had the money, he took the Fifth Amendment and he wouldn't testify to it in Court, so we've never been able to make a determination what he did with it. (Emphasis added by court of appeals)

Turner's testimony was in direct violation of 11 U.S.C. 25(a)(10). The district court was instructed on remand to examine the evidence presented to the grand jury and

> "If the evidence presented to the grand jury is not found to have been properly derived from legitimate independent sources, Kastigar, supra, 406 U.S. at 461-462, then the indictment must be dismissed, unless the error is held harmless"

The district court dealt with the issue of 11 U.S.C. 25(a)(10) by ignoring it. In the district court order there is no reference to the prohibition of offering testimony by a bankrupt in any criminal proceeding. The district court only dealt with the "legitimate independent source issue". That issue involves immunized testimony. The prohibition against using bankruptcy testimony in a criminal proceeding is broader and refers to any testimony given by a bankrupt in a bankruptcy proceeding. Since the district court ignored that issue it never reached the issue of whether that testimony was harmless. If it had, it is clear that Turner's

testimony could not be held harmless, beyond a reasonable doubt, in a grand jury proceeding investigating possible concealment of assets.

CONCLUSION

The petition for writ of certiorari should be granted since the appeals court affirmation of the district court's decision represents a violation of 11 U.S.C. 25 (a) (10) and the Fifth Amendment rights of the petitioner.

IT IS NOT PROPER TO CONTINUE THE APPEAL PROCESS IN THE CRIMINAL CASE WHEN THE QUESTION OF THE VOLUNTARY NATURE OF THE ORIGINAL PROCEEDING IN BANKRUPTCY IS STILL PENDING BEFORE THE LOWER COURTS.

There is a question of the entire bankruptcy proceeding pending before the district court. Beery has argued since April 15, 1976 that the bankruptcy court has no jurisdiction since the initial petition in bankruptcy was not voluntary. This issue was raised at the tenth circuit and that court made the following comment

in their opinion of May 14, 1982.

"Although Beery argues that he was coerced into signing his Chapter XI petition, there is no evidence in our record to support this assertion. Beery states that there is support in an affidavit he filed on November 4,1977. This affidavit, however, was not made a part of the record on appeal. Moreover, it was filed after the district court's order of October 5, 1977, and the bankruptcy court's order of October 21, 1977, which was affirmed by the district court on March 3, 1978. Under these circumstances we will not consider this allegation."

Therefore the question of the voluntary nature of the original petition has not been adjudicated. It would be an injustice to carry out the criminal sentence if there is a question of the legality of the underlying bankruptcy proceeding. I ask the court to take judicial notice of the pleadings filed in the bankruptcy case 76-39-B5. These pleadings are Docket No. 1654 titled Amendment of Original Petition under Chapter XI and Docket Number 1663 titled Withdrawal of Petition.

CONCLUSION

It would be appropriate for the Supreme Court to issue a stay of mandate

of the criminal sentence pending adjudication of the question of the voluntary nature of the initial petition in bankruptcy at the lower court level.

Dated: Los Alamos, New Mexico
March 4, 1985.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff

v. Case No. 78-10073-01

JEROME G. BEERY, Defendant

MEMORANDUM AND ORDER

Defendant-Appellant Jerome G. Beery originally filed a voluntary bankruptcy petition on January 16, 1976, seeking judicial relief under Chapter XI of the Bankruptcy Act. Dan Turner, an attorney, was appointed receiver of the estate on January 19, 1976. Upon Beery's refusal to file verified statements and schedules pursuant to Bankruptcy Rule 11-11 and 11-12, the bankruptcy judge converted the proceeding to one in straight bankruptcy. Beery was adjudged a bankrupt on April 15, 1976. Dan Turner was named as trustee at the same time.

In September 1978, Beery was indicted by a grand jury with three counts of concealing assets and one count of witholding a document from the receiver/trustee in violation of 18 U.S.C 152. He was also

charged with violating 18 U.S.C. 1632, perjury before the grand jury. Beery was tried before a jury and convicted on the concealment and witholding charges, Count I through IV, and acquitted of perjury, Count V. Beery appealed his conviction.

While the Tenth Circuit Court of Appeals found there was sufficient evidence to support the guilty verdicts as to Count I through Count IV, the Court vacated Beery's convictions and remanded the case to the district court with directions for further findings. United States v. Beery, 678 F. 2d 856 (10th Cir. 1982). The Court concluded that if Beery's immunity protections granted by 11 U.S.C 25(a)(10) were violated by any use or derivative use before the grand jury of testimony which Beery was compelled to reveal at bankruptcy hearings covered by 25(a)(10), the district court must dismiss the indictment unless the court finds the error is harmless, beyond a reasonable doubt. United States v. Beery, 678 F.2d at 860. The Court delineated

specific instructions to the district court to follow:

> The district court should first require Beery to demonstrate that he was required to submit to an examination at bankruptcy proceedings covered by 25(a)(10) concerning matters relating to the federal prosecution. If such a showing is not made by the defendant, the convictions should be reinstated.
>
> If such a showing is made, the district court should afford the Government opportunity to meet its burden of proof as to its sources of its evidence presented to the grand jury and at trial, with any responce the defendant may have. If the evidence presented to the grand jury is not found to have been properly 'derived from legitimate independent sources,' Kastigar, supra, 406 U.S. at 461-462, then the indictment must be dismissed, unless the error is held harmless, beyond a reasonable doubt. If the Government sustains its burden of proof, or if the errors found are harmless, beyond a reasonable doubt, then the convictions should be reinstated. (citation omitted) Id.at 863.

On June 14, 1983, this Court held an evidentiary hearing. The defendant, with assistance from Charles A. Anderson, Federal Public Defender, and the Government were afforded opportunities to present witnesses, evidence, and arguments concerning any aspects of the remanding issues as set out by the Court of Appeals in its

decision. While Beery did not present any witness, the Government called William Piper and Dan Turner to the stand to testify. The Government conceded at the beginning of the hearing that Beery was required to submit to the bankruptcy hearings regarding his bankruptcy petition. Dkt. 116, Evidentiary Hearing Transcript, page 5, hereinafter referred to as "Tr." The only remaining issue is whether the evidence presented by the Government at the grand jury and at trial was properly derived from legitimate independent source.

William Piper, one of the several FBI agents who participated in the investigation which led to the indictment and prosecution of Beery, testified first at the evidentiary hearing in this Court. His testimony, including those adduced on cross-examination by Beery, reflected that he had no knowledge of the contents of the compelled testimony involved in the bankruptcy hearings. Tr 7, 8, 9, 11, 12, 13, 14. Likewise, the testimony of Dan Turner, the trustee, indicated

that he divulged no immunized information from the bankruptcy hearing which was used either before the grand jury or at trial. Tr. 29, 36, 39, 45, 59, 60. This Court agrees that the prosecution in the present case that the Government has satisfied the igh burden of proof commanded by Kastigar. The Court finds by a preponderance of the evidence after viewing the totality of the facts presented at the evidentiary hearing, affidavit, and briefs that the Government did not directly or indirectly use Beery's bankruptcy testimony as a lead to other evidence which was subsequently used at the grand jury hearing and at trial. Similarly, based on the testimony at the evidentiary hearing, the Court finds no witness or other evidence was obtained which was attributable to Beery's bankruptcy testimony. Furthermore, a review of the transcripts of the grand jury hearing, together with Dan Turner's testimony at the evidentiary hearing shows that such testimony was not used to ascertain

knowledge of the details of the crimes and sources of information which would supply other means of convicting Beery. In conclusion, the evidence presented to this Court unqualifiedly supports the conclusion that none of the Government's case was tainted as a result of any illegal use of Beery's bankruptcy testimony.

Accordingly, pursuant to the instructions provided in the opinion of the Court of Appeals, this Court finds the defendant Beery's convictions should be and are affirmed. The defendant's sentences are reinstated.

IT IS SO ORDERED

At Wichita, Kansas this 16th day of August, 1983.

/s/ WESLEY E. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA

v. Case No. 78-10073-01

JEROME G. BEERY

JUDGMENT AND PROBATION/COMMITMENT ORDER

Defendant found not guilty and discharged as to Count V only. Defendant found guilty on Counts I, II, III, and IV, of knowlingly and fraudulently concealing from Dan E. Turner, Receiver, Trustee, and an officer of the Court charged with the control and custody of property, sums of money, all in violation of 18 U.S.C 152.

Defendant is sentenced to five (5) years on each of Counts I, II, III, and IV, said sentences to run concurrently.

5/8/79

/s/ WESLEY E. BROWN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v. Case No. 83-2058

JEROME G. BEERY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 78-10073-01)

Before McKAY, LOGAN and SEYMOUR, Circuit Judges

McKAY, Circuit Judge

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a), Tenth Circuit R. 10(e). The cause is therefore submitted without oral argument.

The defendant was charged with several counts of concealing assets from his trustee in bankruptcy and with perjury to the grand jury. At trial, the jury convicted the defendant on concealing assets charges and acquitted him on the perjury charge. In his

first appeal, United States v. Beery, 678 F.2d 856 (10th Cir. 1982), this court ruled that there was sufficient evidence in the record to support the defendant's convictions. The court vacated the convictions, however, and remanded the case to the district court with instructions to make further findings concerning defendant's allegation that the immunity granted him by 11 U.S.C 25(a)(10) had been violated by use before the grand jury of testimony that he was compelled to give in a bankruptcy proceeding. Specifically, the district court was instructed that it should first give the defendant an opportunity to show that he had been required to submit to an examination covered by 25(a)(10) and relating to matters in the federal prosecution. The district court was then instructed that upon such a showing the burden should shift to the government to prove that the evidence adduced at the grand jury and at the trial had independent sources and had not been derived from defendant's immunized bankruptcy testimony.

The court was further instructed that if it found some of the government's testimony to have been improperly derived from the defendant's immunized testimony, it was to dismiss the indictment, unless it was found beyond a reasonable doubt that the error had been harmless.

On June 14, 1983, the district court held an evidentiary hearing. Evidence was submitted at the hearing by both the defendant and the government. The government called two witnesses: 1) a former FBI agent who had headed the investigation resulting in defendant's conviction, and 2) the trustee in bankruptcy who had testified before the grand ury and at the criminal trial. Based upon the evidence introduced at this hearing, the court concluded that the government did not directly or indirectly use the defendant's bankruptcy testimony as a lead to the evidence that was subsequently used at the grand jury hearing and at the trial. The court, therefore reinstated the defendant's convictions.

The defendant contends that the district court did not correctly follow the instructions on remand in that it did not treat the question of harmless error. However, having determined that the government had not improperly used the defendant's mmunized testimony, the court was not required to make a harmless error determination.

Defendant also contends that the districts court's findings are not supported by the evidence. After reviewing the trial court's opinion, the record transcripts, and the briefs on appeal, we are convinced that the district court's finding that the government's case was not tainted as a result of any illegal use of the defendant's bankruptcy testimony is supported by the evidence. Therefore, the district court's decision is AFFIRMED.

IN THE COURT OF APPEALS FOR THE
TENTH CIRCUIT
JANUARY TERM - February 11, 1985

Before Honorable William J. Hollowary, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA

Plaintiff Appellee

v. Case No. 83-2058

JEROME GRIGGS BEERY

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc in the captioned appeals.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule

35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ HOWARD K. PHILLIPS, Clerk